

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

IP-Enabled Services

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WC Docket No. 04-36

**REPLY COMMENTS OF THE  
AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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## **SUMMARY**

No commenter provided a good reason to abandon the Commission's existing analytical framework for differentiating between "telecommunications" and "information services." By preserving and expanding the body of precedent interpreting the statutory definitions of those terms, including the "net protocol conversion" standard, the Commission provides regulatory stability and predictability for potential providers and end-users of IP-enabled services.

The Commission must reject the BOCs' arguments that the development of IP-enabled applications and services can somehow correct the competitive deficiencies in the market for broadband transmission services. No matter how competitive the IP-enabled applications and services market may be, customers and service providers must still use basic transmission facilities and telecommunications services to access those applications and services. And absent competition in the provision of those basic telecommunications services, customers (and providers) of IP-enabled services and applications will need regulatory protections against unreasonable prices, discriminatory practices, and other anti-competitive behavior by the ILECs due to their market power in the telecommunications services market.

In an attempt to piggy-back on the far more competitive market for IP-enabled applications and services, the BOCs urge the Commission to lump into that category the non-competitive transmission "platform" customers need to access IP-enabled services and applications. The BOCs' desire to collapse the two markets into one unregulated market flies in the face of competitive reality.

By blurring distinctions between the relevant product markets, the BOCs are trying to use their invented category of IP “platform” services as a Trojan Horse for obtaining deregulation of their broadband services, for which end users have no competitive alternatives.

The evidence that broadband markets are not competitive, presented by large users and others in proceeding after proceeding at the FCC, overwhelms the self-interested and unsupported claims regarding competition by the ILECs in this record. Therefore, the Commission should finally recognize in this proceeding that, regardless of competition in the provision of IP-enabled services, the ILEC-provided “last-mile” broadband services on which enterprise customers continue to depend are not subject to effective competition, are not likely to become competitive anytime soon, and must continue to be regulated in the meantime.

The “Fact” Report, co-sponsored by the BOCs and filed with their comments, is no different from the many insubstantial “fact” reports filed by the BOCs in the past. It relies on self-interested speculation and marketing hype regarding the future quality and availability of IP services and broadband competition; misleading and irrelevant price comparisons; and shockingly inaccurate quotations and misrepresentations of public sources.

The report’s disregard for accuracy hardly inspires confidence in the conclusions it purports to draw.

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The Ad Hoc Telecommunications Users Committee (“Ad Hoc” or “the Committee”) hereby submits its reply comments in response to the Commission’s March 10, 2004 *Notice of Proposed Rulemaking* (“Notice” or “NPRM”) in the above-captioned proceeding.<sup>1</sup>

As discussed in greater detail below, enterprise customers and other access customers remain dependent on the ILECs’ broadband transmission services because they have so few competitive alternatives. No amount of competition in the market for IP-enabled applications and services can change that stark reality. Accordingly, the Commission should focus its regulatory efforts on the market for

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<sup>1</sup> *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. Mar. 10, 2004) (“Notice” or “NPRM”).

those telecommunications services and allow the nascent market for IP-enabled applications and services to develop without regulatory intrusion.

**I. THERE IS NO BASIS IN THE RECORD FOR ABANDONING THE EXISTING DEFINITIONAL FRAMEWORK FOR “TELECOMMUNICATIONS” AND “INFORMATION SERVICES”**

In its Comments, Ad Hoc urged the Commission to retain its existing analytical framework for differentiating between regulated “telecommunications” and unregulated “information services.” Ad Hoc pointed out the benefits of doing so and the statutory definitions that require the Commission to distinguish between the two kinds of services. Ad Hoc’s comments urged the Commission to retain the standards and criteria in its existing rules, as interpreted by the courts and the Commission in prior decisions, because the existing body of regulation and precedent provides “robust, flexible, and well-developed criteria for differentiating between the two types of services,” citing a number of decisions applying the criteria in a variety of settings.<sup>2</sup>

By preserving and adhering to this body of decisions, the Commission provides regulatory stability and predictability for potential providers and end-users of IP-enabled applications and services. Both groups require a reasonable degree of certainty that, when they make capital investments in information technologies and communications services, the technological and economic underpinnings of their decisions will not be disrupted by fundamental shifts in the Commission’s regulatory treatment of their services. When the Commission’s decision-making

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<sup>2</sup> See Comments of the Ad Hoc Telecommunications Committee, filed May 28, 2004 (“Ad Hoc Comments”) at 6, note 10.

process is stable and predictable, customers, carriers, and information service providers can make informed decisions regarding the regulatory costs and consequences of IP-enabled services and the appropriate configuration of their services. And the Commission stimulates, or at least avoids discouraging, the development of innovative applications and new information technologies built on traditional telecommunications services.

Indeed, the Commission itself has recognized that regulatory stability is a compelling reason to preserve its precedent regarding the definition of information services.<sup>3</sup> Ad Hoc urged the Commission to build on that precedent and continue its case-by-case, factually-driven determinations of the appropriate regulatory classification for individual IP-enabled services.

No party proffered a persuasive justification for abandoning the existing framework and several parties joined Ad Hoc in advocating retention of the Commission's existing approach to interpreting and applying the statutory framework.<sup>4</sup> Many parties endorsed in particular a "layered" approach like that outlined by MCI in its comments and an earlier white paper provided to the Commission.<sup>5</sup> Ad Hoc also endorses MCI's "layered approach" as a useful analytical tool for understanding how information and communications technologies interoperate and for determining when a particular technology performs a

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<sup>3</sup> See Ad Hoc Comments, notes 11 and 12 and text accompanying.

<sup>4</sup> See, e.g., Comments of ITAA, filed May 28, 2004, at 4-5; Comments of Qwest, filed May 28, 2004, at 14-19; Comments of SBC, filed May 28, 2004, at 37-38.

<sup>5</sup> See, e.g., Comments of 8x8, filed May 28, 2004, at 7; Comments of Pulver, filed May 28, 2004, at 11; Comments of Vonage, filed May 28, 2004, at 7-9; Comments of AT&T, filed May 28, 2004, at 4, 6, 15-28.

telecommunications function rather than one of the functions identified in the statute's definition of information services.

Many commenters have focused on the "net protocol conversion" standard for classifying services as information services under the Commission's existing rules, with some urging the Commission to retain it<sup>6</sup> and others arguing for its elimination.<sup>7</sup> If the Commission abandons the standard, certain VoIP services that constitute information services because they provide a net protocol conversion can be re-classified, and regulated, as telecommunications.

Ad Hoc appreciates the pressure on the FCC to modify or eliminate the net protocol conversion standard and thereby eliminate some of the most contentious VoIP controversies before it. But the net protocol conversion standard applies to a wide variety of information services other than the handful of VoIP services whose providers are relying on it to classify their services as information services. Thus, the standard is much more than an inconvenience to parties seeking to extend access charges and USF rules to certain VoIP services; it is a key attribute of many non-VoIP information services. Those services should not suddenly become telecommunications services as the fall-out of some unthinking rush to extend telecommunications regulation to VoIP services by eliminating the net protocol conversion standard.

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<sup>6</sup> See, e.g., Comments of ITAA at 7; Comments of Qwest at 19; Comments of Vonage at 31-32; Comments of Level 3, filed May 28, 2004, at 10-13; Comments of AT&T at 19.

<sup>7</sup> See, e.g., Comments of Sprint, filed May 28, 2004, at 14-15; Comments of Time Warner Telecom, filed May 28, 2004, at 25-27.



The Commission should resist attempts to throw the baby out with the bath water by eliminating a useful tool for differentiating between telecommunications and information services or otherwise to distort the long-standing Commission and judicial orders and analyses establishing the net protocol conversion standard. Instead, the FCC should reduce the need for hair-splitting classifications of IP-enabled applications and services by addressing directly the intercarrier payment and USF contribution issues fueling much of the VoIP controversy.

The reforms advocated by Ad Hoc in the USF and intercarrier compensation dockets would do just that. For example, Ad Hoc advocates a USF contribution assessment methodology based on number assignments rather than revenues from “telecommunications.” This approach eliminates incentives for service providers to mischaracterize whether a particular VoIP service is or is not “telecommunications” for VoIP purposes, and eliminate carrier concerns that VoIP will undermine the current USF subsidy mechanism. Similarly, the unified intercarrier compensation system advocated by Ad Hoc in the *Intercarrier Compensation Rulemaking*,<sup>8</sup> applies cost-based pricing principles to all services, without regard to customer or content, thereby eliminating the need to distinguish between Internet access and Internet telephony.

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<sup>8</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (“*Intercarrier Compensation Rulemaking*”).

## II. IP-ENABLED SERVICES DO NOT CORRECT THE COMPETITIVE DEFICIENCIES IN THE TRANSMISSION SERVICES MARKET

Unlike some of the commenting parties, the *NPRM* acknowledges the difference between IP-enabled applications and services, and the broadband (and even narrowband) transmission facilities over which those services are provided.<sup>9</sup> That distinction is crucial if the Commission is to develop appropriate regulatory responses to the “rise of IP.”<sup>10</sup> Ad Hoc pointed out in its comments that, when the *Notice* asked whether IP services and applications “may permit competitive developments in the marketplace”<sup>11</sup> to replace regulation, the *Notice* begged an important question, namely, *which* marketplace – the marketplace for IP-enabled applications and services or the broadband transmission networks upon which they depend?

Competitively-provided IP-enabled applications and services can only make regulation unnecessary in the marketplace for IP-enabled applications and services. As Ad Hoc emphasized in its comments, no matter how competitive that market may be, customers and service providers must still use basic transmission facilities and telecommunications services to access those applications and services. And absent competition in the provision of those basic telecommunications services, customers (and providers) of IP-enabled services and applications will need regulatory protections against any unreasonable prices, discriminatory practices, or other anti-

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<sup>9</sup> *NPRM* at ¶¶ 2-3, nn. 2 & 3.

<sup>10</sup> *Id.* at ¶ 4.

<sup>11</sup> *Id.*

competitive behavior by providers with market power in the telecommunications services market.

In their comments, the largest incumbent local exchange carriers (“ILECs”) once again demand complete deregulation of the broadband services used by enterprise customers with unsupported (and unsupportable) claims that such services are already competitive, that any regulation of those services is unnecessary, and that investment in broadband will only occur in the absence of all regulation. Since the subject of this docket is the regulatory treatment of IP-enabled services, and *not* the physical networks over which they are provided, the ILECs propose to radically expand the category of IP-enabled services to include the transmission “platform” for them.<sup>12</sup> The Bell Operating Companies (“BOCs”), in their comments and in the *BOC VoIP Report*<sup>13</sup> referenced therein, incorrectly imply that downstream competition in the provision of VoIP will somehow transform the monopolized upstream transmission market that is used to provide the information service.

As explained below, this proposed bundling of basic telecommunications service with any information services associated with a particular IP-enabled application or service into one unregulated market is inconsistent with the *Computer*

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<sup>12</sup> Comments of SBC, filed May 28, 2004, at 20-25; Comments of BellSouth, filed May 28, 2004, at 62 (“SBC demonstrates that Title II regulation of IP platform services is not necessary to ensure that charges and practices in connection with such services are just and reasonable and not unjustly or unreasonably discriminatory. Pressures in the highly competitive market for IP platform services will continue to ensure the reasonableness of market rates.”); Comments of Verizon, filed May 28, 2004, at 20 (“competition for broadband services is flourishing”).

<sup>13</sup> See “Competition in the Provision of Voice over IP and Other IP-Enabled Services,” Huber and Leo, filed May 28, 2004, on behalf of BellSouth, Qwest, SBC, and Verizon (“*BOC VoIP Report*”), discussed in Section III, *infra*.

*Inquiry*<sup>14</sup> framework and would discourage, if not completely disable, future innovation in the development and implementation of IP-enabled services. In addition, the BOCs' approach improperly merges two economically and technologically distinct product markets, one with highly competitive characteristics and the other long dominated by the ILECs. Ad Hoc believes that the competitive differences among these complementary services are appropriately captured in MCI's Layers Model, under which the provision of non-competitive transmission facilities could be subject to common carrier regulation while functions susceptible to competition are unregulated.<sup>15</sup>

**A. Broadband Transmission Services and IP-enabled Applications and Services Are Separate Product Markets**

The BOCs' collapsed view of IP-enabled services and broadband access does not reflect the realities of the two entirely distinct product markets. When products (including services) exist in the same relevant market, they are perceived as substitutes and compete against each other to obtain the greater share of that market. Any growth in market share obtained by one service comes at the expense of market share for the other, whether the growth is attributable to a transfer of existing demand or a smaller allocation of any increase in total demand. This is not the case with respect to basic transmission or telecommunications services and IP-enabled applications and services, including VoIP information services, which

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<sup>14</sup> See *NPRM* at n. 82 and cases cited therein.

<sup>15</sup> MCI Comments at 10-11 recommends that regulatory policy based on the layers model "assess market power separately for each layer" and prevent companies who possess market power at a lower layer from leveraging that power to harm competition in markets that involve uppers layers.

represent complementary markets. Unlike products that compete with each other, demand for broadband can be expected to increase the demand for IP-enabled information services (and vice versa).

In the past, the definition of product markets in telecommunications has not been particularly controversial and the Commission does not have a large body of precedent on this topic.<sup>16</sup> Often, with respect to market definition, the Commission has followed guidelines established by the Department of Justice and Federal Trade Commission.<sup>17</sup> Under those guidelines, a key determinant of the relevant product market is consumer response to price increases – that is, consumers’ choices between goods competing in the same market must be able to sufficiently constrain a price increase with respect to any one of those goods.<sup>18</sup> Applying this to broadband and IP-enabled services such as VoIP demonstrates the fallacy of collapsing these two products into a single, integrated market. Simply put, consumer choices with respect to IP-enabled applications and services does not

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<sup>16</sup> The Commission has raised the issue of the relevant product market for broadband services in its Broadband Regulation Rulemaking, which is still pending. See *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (“Broadband Regulation Rulemaking”).

<sup>17</sup> United States Department of Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41554-41555 §§ 1.0 - 1.2 (1992) (1992 Horizontal Merger Guidelines). See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 324-25 (1962) (defining relevant product market in terms of reasonable interchangeability of a service or product and its substitute, while considering price, use, and quality) (cited at footnote 89, *Application for Merger of Bell Atlantic and NYNEX*, 12 RCC Rcd 19985 (1997)).

<sup>18</sup> The U.S. Department of Justice states that the “[m]arket definition focuses solely on demand substitution factors -- i.e., possible consumer responses.” ([http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/10.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/10.html), accessed 6/25/04.)

constrain price increases by competing broadband transmission service providers (and vice versa).

Moreover, the concept of the consumer or “buyer” who must choose among competing products in the product market is not limited solely to retail end-users. Many goods in vertically oriented industries are sold to value-added resellers in the form of intermediate goods. In the case at hand, transmission acts as an intermediate good for independent ISPs. For such ISPs, broadband access is a wholesale input (intermediate good) to the information service (end-user good) that they provide to their own customers. From the perspective of an ISP, neither VoIP or any other ILEC-provided information service is a “substitute” for basic DSL service or other high-capacity services.

The ILECs are disingenuous (at best) in their claims that the proposed “bundling” of IP-enabled applications and services with DSL or other broadband telecommunications services will not harm competition for the provision of IP-enabled applications and services. In its Petition for Declaratory Ruling, for example, SBC asserts that even if the Commission forbears from regulation with respect to exchange access services in the transmission “platform” for IP-enabled services, “a CLEC would still be entitled to lease those underlying network elements that meet the standards of section 251(d)(2), as such standards are evaluated from time to time by the Commission.”<sup>19</sup> At the same time, SBC urges the Commission exclude the ILECs’ broadband “platform” from any unbundling obligation, enforcing

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<sup>19</sup> Petition of SBC Communications, Inc. for a Declaratory Ruling (filed February 5, 2004) at ii-iii.

such obligation only with respect to “legacy common carrier facilities and services that are used today for PSTN-based telecommunications.”<sup>20</sup>

Were the Commission to accept this proposal, the end result would be that independent ISPs (those not affiliated with the BOCs) would be limited to serving their customers using PSTN dial-up access, unless they could identify another supplier of broadband to serve them. With no viable competitive alternatives to the BOCs broadband services in most markets, and ongoing uncertainty about which unbundled network elements will remain available to CLECs, it is all the more important that ILECs be held to their obligation to provide basic broadband access on an unbundled basis to unaffiliated ISPs, as well as to enterprise customers for use in private network applications.

The BOCs’ attempt to distract the Commission from the issue at hand is also reflected in the BOC VoIP Report, discussed in greater detail in Section III, *infra*. Not a single party to this proceeding is contesting the fact that VoIP – as a stand-alone IP application – is competitive. Thus, the BOCs hardly need to waste expensive legal resources proving that point. Instead, by blurring distinctions about the relevant product markets, the BOCs are essentially using the artificial category of IP “platform” services as a Trojan Horse for obtaining deregulation of non-competitive broadband broadband. The Commission should not permit the BOCs to redefine this proceeding in such a manner.

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<sup>20</sup> SBC Comments at 49.

## **B. The Broadband Transmission Services Market Is Not Significantly Competitive**

Anticipating that other parties might disagree with their declaration that broadband access is competitive by virtue of competition for the IP-enabled applications and services that are offered over it, the BOCs use their *BOC VoIP Report* to renew their claims that broadband access services are indeed competitive, with or without IP-enabled applications and services. In an appendix to the *BOC VoIP Report*, the BOCs resubmit their case concerning stand-alone broadband competition, an update of earlier submissions.<sup>21</sup>

Ad Hoc has repeatedly challenged before this Commission the ILECs' persistent misrepresentations regarding the nature and status of competition for broadband access.<sup>22</sup> In this proceeding, the BOCs merely repeat their previous unsupported assertions, updating figures with respect to cable modem deployment but still leaving unanswered the many substantive criticisms of their earlier submissions.

With respect to broadband competition from "other sources,"<sup>23</sup> including fixed wireless, BPL, satellite, and third-generation mobile wireless services, the *BOC VoIP Report* relies on marketing pronouncements and investor briefings, founded in self-

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<sup>21</sup> BOC VoIP Report, Appendix A, Broadband Competition, May 2004.

<sup>22</sup> Enterprise customer concerns regarding the lack of competition in the high-capacity market have been well-documented in multiple pleadings filed in the Commission's proceedings and catalogued most recently in Ad Hoc's brief before the U.S. Court of Appeals for the District of Columbia Circuit in support of AT&T's petition for mandamus on special access regulation. See Intervenor's Initial Brief, *In re AT&T Corporation, et al.*, No. 03-1397 filed June 8, 2004.

<sup>23</sup> *BOC VoIP Report* at A-8.



interested but unproven speculation, not actual market experience. Where deployments are cited, they typically involve market trials or isolated launches, not stable and broadly available service offerings. With BPL, the report can only cite to two commercial “rollouts” under way; most of the report’s discussion is on the vast “potential” for this as-yet undeployed technology.<sup>24</sup>

As the Ad Hoc Committee has repeatedly demonstrated, the ILECs claims with respect to competition for the broadband services they currently provide (including high-capacity special access) are both overstated and unproven. Ad Hoc has provided evidence in multiple proceedings that contradicts the ILECs’ claims, including the *Pricing Flexibility Rulemaking*,<sup>25</sup> the *Performance Standards Rulemaking*,<sup>26</sup> and the *Broadband Regulation Rulemaking*.<sup>27</sup>

In the *Broadband Regulation Rulemaking*, Ad Hoc submitted the results of a member survey of competitive conditions at over 30,000 locations, which revealed that viable competitive alternatives were typically not available.<sup>28</sup> Ad Hoc

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<sup>24</sup> BOC VoIP Report at A-13.

<sup>25</sup> *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999), *aff’d sub nom WorldCom, Inc. v. FCC*, 238 F. 3d 449 (D.C. Cir. 2001) (“*Pricing Flexibility Rulemaking*”), Comments of the Ad Hoc Telecommunications Users Committee (October 26, 1998) at ii, 24-27.

<sup>26</sup> *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) (“*Performance Standards Rulemaking*”), Comments of the Ad Hoc Telecommunications Users Committee (January 22, 2002) at 2-3, 5; (February 12, 2002) at 11, 13.

<sup>27</sup> *Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (“*Broadband Regulation Rulemaking*”).

<sup>28</sup> See Comments of Ad Hoc Telecommunications Users Committee in *Broadband Regulation Rulemaking*, filed March 1, 2002.

demonstrated that the most widely available alternative for broadband access for mass market customers – cable modem service – is not nearly so widely deployed where enterprise customers are located.<sup>29</sup> Ad Hoc pointed out as well – and without credible rebuttal from the ILECs – that cable transmission has reliability and security issues that curtail its use by business customers as a substitute for services provided over ILEC facilities.<sup>30</sup>

In short, the Ad Hoc Committee and other access customers, as well as the Commission, have repeatedly recognized that actual competition cannot be assessed based upon speculation about what may develop in the future with novel but unproven technology platforms. For now, the competitive deployment of broadband services is still sparse, even with respect to large business customer locations. As MCI explains:

Alternatives in the physical access layer are even more limited for enterprise customers [than for mass market customers]. The vast majority of business customers can obtain their IP-enabled services only over incumbent LEC special access services. And, as with mass market customers, there are only limited prospects for expanding the number of locations with competitive alternatives. Not only are there “extremely high economic and operational barriers in deploying DS1 loops,” which are the primary means by which enterprise customers obtain IP-enabled services, but the incumbent LECs have erected other roadblocks as well.<sup>31</sup>

Weighing the evidence presented by large users and others in proceeding after proceeding against the entirely self-interested and poorly supported assertions of the

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<sup>29</sup> *Id.* at 14-17.

<sup>30</sup> *Id.* at 17-19.

<sup>31</sup> Comments filed by MCI, May 28, 2004, at 15 (footnotes omitted).

ILECs regarding competitive alternatives for their broadband access services, the Commission should finally and definitively recognize in this proceeding that, regardless of competition for the provision of IP-enabled services, the ILEC-provided “last-mile” broadband on which end users, ISPs, and CLECs continue to depend are not subject to effective competition and must continue to be subject to regulation.

### **III. THE *BOC VOIP REPORT* FAILS TO PROVIDE THE “FACTUAL” SUPPORT IT PROMISES**

In addition to their initial comments, the BOCs have co-sponsored a report prepared by attorneys Peter Huber and Evan Leo.<sup>32</sup> The so-called VoIP “Fact” Report attempts to bolster the BOCs’ claims that IP-enabled services and broadband services are fully competitive, individually and jointly. Like other prior BOC “fact” reports, the *BOC VoIP Report* relies heavily on financially self-interested predictions, misleading and irrelevant price comparisons, and inaccurate and misrepresented quotations. Indeed, the *BOC VoIP Report* contains so many misrepresentations and overstatements that a comprehensive rebuttal can not realistically be conducted in the context of these reply comments. Instead, Ad Hoc has analyzed representative elements from the report to illustrate the kinds of data misuse reflected throughout the report. In the final analysis, this report only detracts from the Commission’s continuing dialogue concerning the actual rate of substitution between traditional circuit-switched telephone services and IP-enabled services.

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<sup>32</sup> “Competition in the Provision of Voice over IP and Other IP-Enabled Services,” Huber and Leo, filed May 28, 2004, on behalf of BellSouth, Qwest, SBC, and Verizon (“*BOC VoIP Report*”).

### **A. Use of Financially Self-interested Predictions Instead of Facts**

The *BOC VoIP Report* follows in the footsteps of other BOC attempts to pass off industry-sponsored hype and investment community speculation as “fact.” This is particularly true for the report’s discussion of VoIP’s sound and service quality – an essential variable to determine VoIP’s likely substitutability for traditional circuit-switched service. The report bases its conclusion – that VoIP “provides comparable or superior quality and functionality to conventional circuit-switched service”<sup>33</sup> – on a series of marketing pieces from VoIP service and equipment providers (such as Vonage and Cisco), which advertise that VoIP provides “reliability and voice quality of the global switched telephone network.”<sup>34</sup> These weak, non-authoritative source materials have an inherent bias because they are used to promote the sale of the service by financially vested parties. As such, they should not be the basis of broad overarching conclusions about the reliability and service quality of VoIP.

Moreover, the Report ignores contrasting views of VoIP quality – even those opinions of the parties represented by the report. Verizon spokesman Jim Smith, for example, has described VoIP by saying, “We think it’s a great innovation. But there are things that are not good about it, including some reliability issues.”<sup>35</sup> A broader survey reveals that VoIP service quality remains a legitimate concern to more

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<sup>33</sup> *BOC VoIP Report*, at 18.

<sup>34</sup> Those still stinging from following “investment analysts” advice two years ago will understand the irony in using those analysts reports as evidence of a technology’s likelihood of success. *BOC VoIP Report* at 19, Table 5.

<sup>35</sup> [http://www.pulp.tc/htmlcablevision\\_launches\\_internet\\_.html](http://www.pulp.tc/htmlcablevision_launches_internet_.html), accessed 7/8/04.

objective industry analysts as they contemplate its future.<sup>36</sup> Characteristically, the BOC Report prefers only to recognize the more rosy predictions of those hoping to promote investments in new technologies. In reality, the future of VoIP and the acceptability of this service to consumers remains entirely uncertain. As David Barden, a Bank of America analyst recently stated, “This profits-are-huge, the-market’s-exploding, the-opportunity-is-ripe-for-picking mantra seems eerily reminiscent of past disappointments.”<sup>37</sup>

### **B. Misleading price comparisons of non-equivalent services**

To bolster its argument that VoIP substitution will occur rapidly, the *BOC VoIP Report* presents a VoIP/Circuit-switched price comparison in its Table 3 (on p. 15), which purports to show that VoIP is significantly cheaper than traditional circuit-switched service. Table 3 misrepresents, however, the actual cost to consumers of telephone service using VoIP technology.

Traditional telephone service over the PSTN includes both (1) network access and (2) network service. The PSTN prices captured in the Report reflect both of these pieces. In the VoIP comparisons, the authors appear to assume that customers using VoIP have their broadband service in place for some independent

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<sup>36</sup> Another illustrative criticism states that “[VoIP] service is only as good as your broadband connection. If your network hiccups while sending a document or receiving a big movie file, it means a delay that most people would ignore or not even notice. But delays on phone calls are harder to tolerate.” <http://www.cnn.com/2004/TECH/internet/07/08/vip.growing.pains.ap/index.html>, accessed 7/8/04.

<sup>37</sup> <http://www.cnn.com/2004/TECH/internet/07/08/vip.growing.pains.ap/index.html>, accessed 7/8/04.

purpose and thus do not reflect that cost as attributable to VoIP. The result is a skewed and unrealistic comparison.

To use VoIP, a customer must also have some form of broadband connection to an ISP. The customer could obtain this access via cable modem service, in which case there is a separate charge involved, which falls in the range of \$40 - \$60 a month.<sup>38</sup> Alternatively, the customer could obtain broadband via ILEC-provided DSL. However, only BellSouth and Qwest currently offer DSL service to non-voice customers, which they both market for roughly \$45.<sup>39</sup> Once this additional cost is included, the outlay required by a customer to obtain telephone service using VoIP ranges from \$70 – \$100 a month, while BOC circuit-switched service ranges from \$50 – \$60 (See Table 1 below). Thus, the price comparisons presented in BOC's Table 3 (which looks very much like the "Voice" row of Table 1 below) do not accurately model the actual price of VoIP-based telephone service.

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<sup>38</sup> While the *BOC VoIP Report* states that cable-based broadband costs between \$42 and \$50, these prices assume that the subscriber also purchases a high-end cable package. Prices are more expensive (in the \$50 - \$60 range) if the subscriber does not purchase cable or only purchases a "basic" package. See <http://www.comcast.com/Buyflow/default.ashx>, <http://www.comcast.com/Buyflow/default.ashx>, <http://www.optimumonline.com/index.jhtml;jsessionid=0UXGQBQSWI02ICQLASDCFEQKBMCI0I5G?pageType=pricing>, <https://store.earthlink.net/cgi-bin/wsisa.dll/store/product.html?product=cable>, <http://www3.twcny.com/NASApp/CS/ContentServer?pagename=twcnyc/internet&mysect=internet/rates>, and <http://www.cox.com/tucson/highspeedinternet/hsi%2Dpricing.asp>, all accessed 7/7/04.

<sup>39</sup> Verizon and SBC do not currently offer DSL service to non-voice customers. See <http://www.fastaccess.com/content/consumer/products.jsp>, [http://www.qwest.com/residential/products/qcdsl/msn\\_deluxe.html](http://www.qwest.com/residential/products/qcdsl/msn_deluxe.html), [http://www04.sbc.com/DSL\\_new/content\\_new/1,,18,00.html?pl\\_code=MSBC245C8952P192181B0S0](http://www04.sbc.com/DSL_new/content_new/1,,18,00.html?pl_code=MSBC245C8952P192181B0S0), [http://www22.verizon.com/ForHomeDSL/channels/dsl/forhomedsl.asp?promotion\\_code=VZCOM/COM&variant](http://www22.verizon.com/ForHomeDSL/channels/dsl/forhomedsl.asp?promotion_code=VZCOM/COM&variant), all accessed 7/13/04.

<b>Table 1</b> Price Comparison of Circuit-Switched and VoIP-Based Telephone Service Breaking out Service and Access Costs					
Service	Circuit-switched		VoIP		
	BOC	Comcast	Cable	Vonage	AT&T
Voice	\$50 - \$60	\$50	\$35 - \$40	\$30	\$40
Access	\$0	\$0	\$40 - \$60		
<b>TOTAL</b>	<b>\$50-\$60</b>	<b>\$50</b>	<b>\$75 - 100</b>	<b>\$70 - \$90</b>	<b>\$80 - \$100</b>

**C. Unreliable use of publicly available sources or proprietary sources that can not be verified**

The *BOC VoIP Report* is supported throughout by quotes and cites to sources that, when checked, turn out to be used outside of their intended scope or completely misused. Indeed, many of these quotes are used to justify critical elements of the report's conclusions (such as service quality, adoption, and the enterprise market) and thus raise significant concerns regarding the robustness and reliability of its conclusions.

For example, the Report represents that the D.C. Circuit Court of Appeals recently found that "the retail market for broadband services provided to large businesses is 'rapidly expanding and prosperous,' with competition 'not only ...

surviv[ing] but ... flourish[ing].”<sup>40</sup> While the D.C. Circuit does in fact use the phrases “rapidly expanding and prosperous” and “not only ... surviv[ing] but ... flourish[ing],” the Court’s statements have absolutely nothing to do with broadband.

The first quotation comes from a statement by the Court related to wireless adoption. The full statement is: “[t]he FCC and the wireless intervenors do not challenge the assertion that the current regime has witnessed a rapidly expanding and prosperous market for wireless service.”<sup>41</sup> Similarly, the second quoted phrase was part of a broad commentary on the pro-competitive goals of 1996 Act, not a discussion of enterprise broadband. The complete statement is: “[r]ather, [the Act’s] purpose is to stimulate competition – preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the commission to impose the costs of mandatory unbundling.”<sup>42</sup> Thus, the report cobbled together unrelated words to suggest the federal court’s endorsement of the BOC’s unique view of broadband competition.

The report’s disregard for accuracy hardly inspires confidence in either the reliability of its characterization of supporting sources or the conclusions it purports to draw from them.

There are many other examples in the Report of similar misrepresentations. The Report claims, for example, that “when voice over broadband is routed over the

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<sup>40</sup> *BOC VoIP Report*, at A-20.

<sup>41</sup> *United States Telecom Assn. v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004).

<sup>42</sup> *Id.*



public Internet,...service quality is comparable to, or better than typical wireless service.”<sup>43</sup> Yet the sources cited for this statement, appearing in footnote 102, did not include the key modifiers “comparable” or “better.” It is easy enough to quote material accurately; such verbal sleight of hand casts doubt on the credibility of the BOCs’ entire presentation.

While Ad Hoc was able check the accuracy of many of the publicly available sources, a substantial majority of the 273 footnotes in the *BOC VoIP Report* (including the main text and Appendix A) reference proprietary sources. In the past, the Commission has rejected or given slight credence to evidence based on proprietary sources that are not available for scrutiny by other parties to the proceeding. Given the discrepancies and inaccuracies exposed by examining the publicly available sources cited in the report, the Commission should have even more serious concerns about those that cannot be scrutinized.

## CONCLUSION

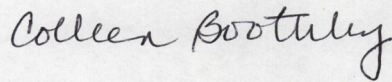
IP-enabled applications and services are promising technologies for enterprise customers who are intensive users of communications services. Sadly, the mere introduction of these technologies does not change the competitive characteristics of the underlying transmission networks on which IP applications and services must ride. Enterprise customers continue to face a broadband telecommunications market that lacks sufficient competition to discipline pricing and

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<sup>43</sup> *BOC VoIP Report* at 20.

carrier practices in the exchange and exchange access markets. Accordingly, the Commission need not disturb its existing Commission precedent interpreting and applying the statutory definitions for “information services” and “telecommunications.” Instead, the Commission should use the development of IP-enabled applications and services as an opportunity to build support for reforming the rules for intercarrier payments and USF subsidy assessments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Colleen Boothby". The signature is written in dark ink on a light-colored, slightly textured background.

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July 14, 2004

## CERTIFICATE OF SERVICE

I, Michaelleen I. Terrana, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were served this 14<sup>th</sup> day of July, 2004 via the FCC's ECFS system, and by electronic mail upon the following:

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May 28, 2004